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IN THE

Supreme Court of the United States

October Term, 1955

No. 780

DAVID KLAPHOLZ and PAULA KLAPHOLZ,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1955

No.

DAVID KLAPHOLZ and PAULA KLAPHOLZ,
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against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners pray that a writ of certiorari issue to review the judgment in the United States Court of Appeals for the Second Circuit, entered on the 21st day of February, 1956, which affirmed an order of the United States District Court

(1) denying defendants' motion to suppress evidence in advance of trial;

(2) denying defendants' motion for an order vacating and quashing a search warrant for the search of defendants' apartment;

(3) denying defendants' motion for an order vacating and quashing a search warrant for the search of a safety deposit box in the name of the defendant Paula Klapholz.

(a) Opinions Delivered in the Courts Below

An opinion was delivered in the District Court for the Southern District of New York; it has been reported at 17 F. R. D. 18.

An opinion was delivered in the United States Court of Appeals for the Second Circuit. A copy of that opinion is set forth in the Appendix to this Petition.

(b) The Grounds on Which the Jurisdiction of This Court is Invoked

1. The judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed, was entered on February 21, 1956 at 12:00 noon.

2. There was no order respecting a rehearing, and there has been no order granting an extension of time within which to petition for certiorari.

3. It is believed that 28 U. S. Code, Section 1254 and 18 U. S. Code, Chapter 237, Rule 37, confer jurisdiction on this Court.

(c) Questions Presented for Review

1. Where it is found that a detention without arraignment is unreasonable in length, may the detention be divided into two periods, for the purposes of a motion to suppress evidence secured as a result of the detention?

2. Where a United States Commissioner was shown to have been available and to have signed a search warrant for the search of the very defendants' apartment after the defendants had been arrested, on Monday, August 2, did it constitute unreasonable delay to postpone arraignment until Wednesday, August 4?

3. Was sufficient probable cause shown for the issuance of the two search warrants?

4. Was the search warrant for the search of the defendants' apartment valid when executed?

(d) The Constitutional Provisions, and Statutes, Which the Case Involves

1. Constitution of the United States of America—Articles in addition to and amendment of the Constitution—Article IV.

2. Constitution of the United States of America—Articles in addition to and amendment of the Constitution—Article V.

3. 18 U. S. C. Chapter 237, Rule 5.

4. 18 U. S. C. Chapter 237, Rule 41.

These are set forth in the Appendix.

(e) Statement of the Case

On Monday, August 2, 1954, between 3 o'clock and 4 o'clock in the afternoon, Customs Agents acting out of the New York office in the Southern District of New York, apprehended the defendants as they were leaving Idlewild Airport in the Eastern District of New York, in their automobile (Appendix, p. 19a*).

A wooden case had been received by the defendant Paula Klapholz at the office of Scandinavian Air Lines. She had signed a declaration that it contained glassware. As they were apprehended they were asked to return to the airport, where the package was examined, and found to contain diamonds (Appendix, p. 246a).

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* References are to the Certified Joint Appendix.

It appears that the defendants were "placed under arrest" at approximately 4:00 P. M. that day, and were then taken out of the Eastern District of New York, past the United States Court House for that District, and into the Customs Office in the Southern District of New York, past the United States Court House for that District, for questioning, photographing, and fingerprinting, arriving at the Customs Office at 5:15 P. M. They were not arraigned until the following Wednesday at 1:00 P. M., before a Commissioner in the Eastern District (Appendix, p. 246a).

Nevertheless, it appears that Commissioner Platt was available on August 2, after the defendants' arrest, and did sign a search warrant based upon an affidavit indicating they had already been arrested (Appendix, pp. 4a-9a, inclusive).

Between 7 P. M. on August 2 and 1 P. M. on August 4, agents, who installed themselves in the defendants' apartment, connected an extension to the defendants' telephone over which they intercepted all conversations, instructing the defendants what to say (Appendix, pp. 132a, 133a, 243a).

For two days and two nights, agents remained in the defendants' apartment (Appendix, p. 130a).

The search warrant which was issued on August 2 was based on the affidavit of an agent reciting the arrest of David and Paula Klapholz, in connection with a wooden case imported into the United States, in which were concealed approximately 2,000 karats of diamonds; that information that diamonds were concealed in the case came from a confidential informant not in the United States; that the informant had advised that defendants had received eight or nine packages of contrabrand diamonds within the past months (Appendix, pp. 6a, 7a, 8a).

Although the agents were in possession of that warrant on August 2, 1954, they did not execute that warrant until August 4 (Appendix, pp. 5a, 8a).

An additional warrant for the search of the safe deposit box of the defendant Paula Klapholz, based upon a similar affidavit, was issued on August 4, and executed on August 5 (Appendix, pp. 12a, 13a).

On the facts substantially as set forth, WEINFELD, *D. J.*, held:

1. The failure to arraign the defendants by 10:30 A. M., August 3, 1954, constituted unnecessary delay; before that time, there was no unnecessary delay.

2. The warrants were properly issued.

3. The warrants were seasonably executed.

Both the Government and the defendants appealed. The decision was in all respects affirmed.

(f) Concerning State Court Review

No State Court proceedings are sought to be brought up for review.

(g) The Basis for Federal Jurisdiction in the Court of First Instance

The defendants are charged in an indictment returned to the United States District Court for the Eastern District of New York with violation of 18 U. S. C. Section 545 and 18 U. S. C. Section 1001.

(h) Argument

It is believed that the United States Court of Appeals has decided Federal questions in a way in conflict with applicable decisions of this Court, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

a. Concerning the Detention:

The Departure From the McNabb Rule.

Throughout its history there has become woven into the very fabric of our criminal law the principle that it is better to run the risk of acquittal than that the rights of the accused should be diminished. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States,* 318 U. S. 332, at 347 (1943).

Where, as here, it has been shown that Commissioner Platt was actually available the afternoon of August 2, 1954, and did sign a search warrant in this very case, at that time, after the arrest of the defendant, and they were nevertheless not arraigned until two days later, we believe there has been a failure of compliance with Rule 5 of the Rules of Criminal Procedure.

The Courts below appear to have set up a dichotomy; to have created a rather ethereal point of time up to which the arrest without arraignment was proper and following which arrest without arraignment was improper.

We find no basis for such a result in the Rule, which simply provides that a defendant shall be arraigned without unreasonable delay; or in any of the decisions of this Court, which hold either that the delay is reasonable in the light of the circumstances (*Pierce* v. *United States,* 197 F. [2d] 189 [App. D. C. 1952], cert. den. 344 U. S. 846 [1952]; *cf. United States* v. *Walker,* 176 F. [2d] 564 [2d Cir. 1949]), or unreasonable (*McNabb* v. *United States, supra; Upshaw* v. *United States,* 335 U. S. 410 [1948]).

Indeed, not only does there appear in the record no justification for making 10:30 A. M. August 3, 1954, the dividing point between legal detention and illegal detention; the division is novel as well to the law.

b. Concerning the Search Warrants:

1. *The absence of Probable Cause.*

An affidavit submitted for the consideration of the Commissioner to support the issuance of a warrant, must show affiant's personal knowledge of the grounds on which the warrant is sought. The Commissioner must be furnished with facts, not suspicions, beliefs or surmises. Conclusions are insufficient. Affidavits which simply state that the affiant has reason to believe and does believe that a crime has been or is in the course of being committed, or which go no further than to allege conclusions of law or of fact, or which set out on mere information and belief the material facts on which the right to search or seize is based, are insufficient to support a search warrant, and any warrant issued on such an affidavit is invalid. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344 (1931); *United States* v. *Kaplan*, 286 F. 963 (D. C. Ga., 1923); *Giles* v. *United States*, 284 F. 208, 214 (C. A. 1, 1922); *Veeder* v. *United States*, 252 F. 414 (C. A. 7, 1918).

The Government could not prove probable cause by what occurred after the issuance of the warrant. The only persons capable of testifying to that issue were Smith and the United States Commissioner. Neither testified. The Courts erred in permitting testimony as to the events at the apartment for the purpose of showing probable cause.

2. *The meaning of "forthwith".*

Rule 41c of the Federal Rules of Criminal Procedure provides that the officer in possession of the warrant search the person or place named "forthwith".

"Forthwith" is defined in Murray, A New English Dictionary, Vol. IV, at p. 476, as

"Immediately, at once, without delay or interval."

In view of the difficulties attendant at times upon execution of such a warrant, it is provided by the rule that the warrant remain valid for a period of ten days.

We doubt, however, that this provision clothes the officer in possession of a warrant with discretion to serve it or not at any time before the expiration of the ten-day period. Such an interpretation not only renders nugatory the requirement that it be executed forthwith, but conceivably, after a change in circumstances, it may make the warrant a much more potent inquisitorial device than was ever intended by the Rule, violative of the Fourth Amendment to the Constitution.

Conclusion

To cement into our criminal procedure the Rule of the *McNabb* case; to determine and to fix the limitations of the requirement of probable cause in the issuance of search warrants; and to give direction to the word "forthwith" as enunciated by this Court in the Federal Rules of Criminal Procedure, a Writ of Certiorari should issue out of this Court to the United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., March 20, 1956.

Respectfully submitted,

JOSEPH N. FRIEDMAN,
Counsel for Petitioners.

ARTHUR KAPLAN,
of Counsel.

Appendix I

Opinion Delivered by the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 113—October Term, 1955.

(Argued October 19, 1955 Decided February 21, 1956.)

Docket No. 23596

UNITED STATES OF AMERICA,
Appellee-Appellant,

v.

DAVID KLAPHOLZ and PAULA KLAPHOLZ,
Defendants-Appellants-Appellees.

—o—

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

Cross appeals from an order of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge,* on motions to suppress and for return of property unlawfully seized, and motion to suppress for violation of Rule 5(a), Federal Rules of Criminal Procedure. Affirmed.

CORNELIUS W. WICKERSHAM, JR., Chief Asst. U. S. Atty., Brooklyn, N. Y. (Leonard P. Moore, U. S. Atty., and Peter E. DeBlasio, Asst. U. S. Atty., Brooklyn, N. Y., on the brief), for appellee-appellant.

ARTHUR KAPLAN, New York, N. Y., for defendants-appellants-appellees.

Appendix I

HINCKS, *Circuit Judge*:

These are cross appeals from an order of Judge Weinfeld in the Southern District of New York, granting in part and denying in part motions of the defendants to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The opinion of the District Court is reported at 17 F. R. D. 18.

The defendants, who had been arrested in the Eastern District of New York at 4:00 p. m., on August 2, 1954, but whose arraignment had been deferred until August 4, 1954 at 1:00 p. m., moved to suppress all evidence obtained during and by reason of the presence of government agents in the defendants' apartment in the Southern District of New York from about 8:00 p. m. on August 2, 1954 to 11:30 a. m. August 4, 1954, on the ground (1) that the presence of the agents in the apartment violated their rights under the Fourth and Fifth Amendments of the Constitution of the United States and (2) that the delay in arraigning them was in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. The defendants also moved to suppress all evidence obtained as a result of the search made (1) of their apartment on August 4, 1954, and (2) of the defendant Paula Klapholz's safe deposit box on August 4, 1954 pursuant to a warrant dated that date. These motions were filed by the defendants in the court below on September 13, 1954. Meanwhile, on August 23, 1954 indictments against the defendants had been returned to the United States District Court for the Eastern District of New York.

After a hearing in which all the defendants' procedural rights were scrupulously and fully protected the District Court denied the defendants' motions to suppress the evidence obtained by execution of the search warrants. The

denial was based on findings that the warrants were issued on probable cause; that they were sufficient on their faces in stating the grounds of probable cause for their issuance; that the warrants were seasonably executed within the ten-day period specified in Rule 41(d); and that failure to give a receipt for items seized did not invalidate an otherwise lawful search. From the order giving effect to this ruling, the defendants appealed.

We affirm that order on Judge Weinfeld's findings and opinion below.

As to the motion to suppress evidence in addition to that obtained through the search warrants, *i.e.*, evidence which had been obtained through the presence of the government officers in their apartment, the court found that the officers were there by the defendants' consent. That finding required a conclusion—which was implicit, if not expressly stated, in the opinion below—that the search and seizure was not in violation of the Fourth Amendment. However, the judge apparently thought that even though there had been no constitutional violation the evidence might be suppressed if there had been "unnecessary delay" in bringing the defendants before a United States Commissioner in violation of Rule 5(a). Apparently assuming that, on the authority of *McNabb* v. *U. S.*, 318 U. S. 332, the court had jurisdiction to suppress for violation of Rule 5(a), he meticulously found that to defer the defendants' presentation to a Commissioner until August 3 at 10:30 a. m. did *not* involve "unnecessary delay" within the meaning of Rule 5(a), but that the further deferment of the presentation was unreasonable and so *did* constitute "unnecessary delay." Accordingly, it was ordered that, as to evidence obtained through the presence of the government agents in defendants' apartment prior to that date and hour, the motion to suppress should be denied; and that, as to evi-

dence so obtained thereafter, the motion be granted. From this order, both the defendants and the government appealed.

The sole express authority for a pre-trial suppression of evidence by any court other than a trial court is found in Rule 41(e). And the authority thus conferred goes no further than to permit a district court to suppress evidence obtained by unlawful searches and seizures within its district. Its operativeness thus depends on a violation of constitutional rights under the Fourth Amendment. The cases are clear that a breach of Rule 5(a) does not constitute such a constitutional violation. *Brown* v. *Allen*, 344 U. S. 443, 476; *Stein* v. *New York*, 346 U. S. 156, 187; *Upshaw* v. *United States*, 335 U. S. 410, 414, n. 2. It follows that authority to enforce Rule 5(a) is not carried by Rule 41(e).

Until the recent decision in *Rea* v. *United States*, —— U. S. ——, decided January 16, 1956, we think the only judicial technique utilized for the enforcement of Rule 5(a) was the rule of *McNabb* v. *United States, supra*, which was stated (pp. 340-341) as an evidentiary rule of exclusion, formulated by the Supreme Court as a deterrent to the violation of Rule 5(a). In that case, it was held that a trial court could and should in the trial exclude evidence of confessions obtained in violation of Rule 5(a). But neither *McNabb* nor (until *Rea*) any of the cases which have applied and developed its doctrine have held that evidence not obtained by an unlawful search and seizure may be suppressed by a court other than the trial court.* Neither

* In, *In re Fried*, 161 F. 2d 453, we held, that a district court in a district in which a defendant might be indicted and tried, in advance of indictment had power to suppress a confession obtained in violation of the Fifth Amendment, but, with Judge Frank dissenting, was without power to suppress the confession for violation of Rule 5(a). The latter holding was followed in *U. S.* v. *Tuzzo*, D. N. J., 9 F. R. D. 466, and in *U. S.* v. *Quinn et al.*, S. D. N. Y., 17 F. R. D. 342.

statute nor the Federal Rules of Criminal Procedure expressly sanction such assumption of authority.

However, in the *Rea* case, *supra,* the Supreme Court said that the federal Rules "are designed as standards for federal agents" and that, since the Rules were prescribed by the Supreme Court after submission to Congress, it has "supervisory powers over federal law enforcement agencies" and that "Federal courts sit to enforce federal law; and federal law extends to the process issuing from these courts." Accordingly, it held that when "a federal agent has violated the federal Rules governing searches and seizures * * * [t]he power of the federal courts extends to policing these requirements and making certain that they are observed"; and that having such power it was erroneous for a federal court to refuse to enjoin the federal officer from using "the fruits of his unlawful act" as "the basis of testimony in a state court." Under this doctrine, we think it plain that the court below had jurisdiction to entertain and determine motions for the suppression of evidence obtained within its territorial jurisdiction even though it was without jurisdiction to try the moving parties for violations of federal law committed in another district under an indictment therein pending. It is true that here we are concerned with a suppression based on violation of Rule 5(a) instead of one based on violation of the Fourth Amendment which is the subject-matter of Rule 41. But the language and rationale of the majority opinion in the *Rea* case permits no distinction on that account.

However, although we accept the *Rea* decision as decisive on the presence of jurisdiction in the court below to rule as it did, we think the *Rea* decision did not require that court to exercise that jurisdiction. In *Rea,* the exercise of the court's injunctive powers was required because of the showing that a criminal prosecution was pending in a state

court of New Mexico in which the evidence sought to be suppressed might have been admissible even though obtained in violation of the Fourth Amendment.* That feature is absent here. Here, if the court below had declined jurisdiction, the District Court for the Eastern District of New York, in which the moving parties were awaiting trial on a smuggling charge not cognizable in the state courts, on their application would have been duty-bound to apply the *McNabb* rule giving them all relief to which they might be found entitled. If the motions had been there made and ruled on in advance of trial, that court would have been free to re-examine its preliminary ruling in the context of the trial record and the pre-trial ruling would not have been independently appealable under 28 U. S. C. A. 1291. *Cogen* v. *U. S.*, 278 U. S. 221. *United States* v. *Stephenson*, D. C. Cir., 223 F. 2d 336.

In the setting of this case, in so far as it had been disclosed to us, we think that it would have been a proper and a wise exercise of discretion by the court below, after disposing of the attack on the search and seizure under Rule 41(e), to have declined jurisdiction over the other motions to suppress, leaving the defendants free to move for suppression in the trial court. Such a course would have avoided invasion of the trial court's normal province** to pass on the admissability of evidence in the trial without jeopardy to the right of the defendants to the exclusion of evidence under the *McNabb* rule. But by ordering suppression in an independent proceeding, as in *Dier* v. *Banton*, 262 U. S. 147, it has made a ruling which is independently

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* *Wolf* v. *Colorado*, 338 U. S. 25.

** Until the announcement of the *Rea* decision we had supposed that except for suppression under Rule 41(e) it lay in the exclusive province of the trial court to control the admission of evidence on trial.

appealable and which may possibly be urged to have the effect of *res judicata* in the trial. *Steele* v. *U. S.*, No. 2, 267 U. S. 505. Cf. *Dowling* v. *Collins*, 10 F. 2d 62. However, it does not appear that the government, which was represented below by the District Attorney for the Eastern District, requested that the court decline jurisdiction. In the absence of such a request we cannot say that the court abused its discretion by exercising power which the Supreme Court, in the *Rea* case, held it to have. Especially is this so since the court below might have reasonably concluded that the search and seizure and illegal detainer issues were so closely related as to make it desirable to consider them in one proceeding.

We come, therefore, to the merits of the rulings on the motions to suppress. We agree with Judge Weinfeld that no waiver by the defendants of compliance with Rule 5(a) may be implied from the bare consent of the defendants to the presence of the agents in their home. His findings as to the time reasonably required to accomplish the arraignments were made with painstaking care and were fully supported by the underlying facts. It only remains to consider whether the evidence suppressed was proper subject-matter for suppression under the *McNabb* rule. The order provided that "all evidence derived as a result of the presence of the government agents in the defendants' apartment * * * " subsequent to 10 a. m. on August 4, 1954 "is suppressed." * We think Judge Weinfeld rightly refused to suppress evidence obtained prior to that date and hour.

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* Reading the order in the light of the judge's opinion which was referred to therein, we construe the intended scope of the suppression order as prohibiting the use of the described evidence only against the moving parties. We have no need, therefore, now to determine whether the *Rea* decision may be invoked only by those whom federal agents have detained in violation of Rule 5(a) or whether in the exercise of its asserted power to discipline federal agents the Supreme Court intends that evidence obtained in violation of the Federal Rules shall be inadmissible even against those not otherwise injured by executive action.

U. S. v. *Mitchell*, 322 U. S. 65, 70; *U. S.* v. *Leviton*, 2 Cir., 193 F. 2d 848, 853, cert. den. 343 U. S. 946, reh. den. 343 U. S. 988. We find no intimation to the contrary in the *Rea* opinion. But as to evidence obtained in the defendants' home after that time, does the *McNabb* rule require the suppression of *all such evidence* or is the rule limited to the suppression *of confessions?* Since the rule was one formulated by the Supreme Court as a deterrent to detentions in violation of Rule 5(a), we think that it extends to *all evidence* obtained by federal agents through access to persons while detained in violation of Rule 5(a). It follows that in the setting of this case the order of suppression was within the scope of the *McNabb* rule.

Affirmed.

Appendix II

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of February, One Thousand Nine Hundred and Fifty-six.

Present:

HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DAVID KLAPHOLZ and *ano.*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk.

Appendix III

The Constitutional Provisions, and Statutes which the Case Involves

1. Constitution of the United States of America—Articles in Addition to and Amendment of the Constitution—Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, 1952 edition, page XLIV.

2. Constitution of the United States of America—Articles in Addition to and Amendment of the Constitution—Article V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, 1952 edition, page XLIV.

Appendix III

3. Federal Rules of Criminal Procedure—18 United States Code, Chapter 237—Rule 5

PROCEEDINGS BEFORE THE COMMISSIONER

(a) *Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the District Court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the District Court; otherwise the commissioner shall discharge him. The commissioner shall

admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the District Court all papers in the proceeding and any bail taken by him.

United States Code, 1952 Edition, p. 2526.

4. Federal Rules of Criminal Procedure—18 United States Code, Chapter 237—Rule 41

SEARCH AND SEIZURE

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) *Grounds for Issuance.* A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C. § 957.

(c) *Issuance and contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in

nforcing any law thereof as to a person so authorized y the President of the United States. It shall state the rounds or probable cause for its issuance and the names f the persons whose affidavits have been taken in support hereof. It shall command the officer to search forthwith he person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) *Execution and Return with Inventory.* The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so

obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing.

(f) *Return of Papers to Clerk.* The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the District Court for the district in which the property was seized.

(g) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. As amended Dec. 27, 1948, effective October 20, 1949.

18 United States Code Annotated,* 1951 edition; Federal Rules of Criminal Procedure, Rule 41, pp. 461-463.

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* Official U. S. Code incorrect as to Subdivision C.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 780

DAVID KLAPHOLZ AND PAULA KLAPHOLZ,
PETITIONERS
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 9–16) is not yet reported. The opinion of the District Court (R. 245a–256a) is reported at 17 F. R. D. 18.

JURISDICTION

The judgment of the Court of Appeals (Pet. 17) was entered on February 21, 1956. The petition for a writ of certiorari was filed on March 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) *Execution and Return with Inventory.*—The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the

inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) *Motion for Return of Property and to Suppress Evidence.*—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * * *

STATEMENT

The facts of this case, as found by the trial court, are set forth in its opinion (R. 245a–256a). That court's findings, and the evidence which supports them, may be summarized as follows:

Petitioners are husband and wife. At about 3:15 p. m., on August 2, 1954, the wife received a package at Idlewild International Airport (in the Eastern District of New York) after she had signed a customs declaration that it contained only glassware. She then took the package, a wooden case, to a car where her husband was sitting behind the wheel (R. 20a–21a). Customs agents, who had petitioners under surveillance, asked them to return to the customs office at the airport where the case was opened in petitioners' presence, and was found to contain packages of diamonds in a hollowed-out portion of the case end (R. 21a–23a, 28a).

Petitioners were placed under arrest at approximately 4:00 p. m., and taken directly to the office of the supervising agent of the customs unit in Manhattan (in the Southern District of New York) for questioning, photographing and fingerprinting. They arrived there at about 5:15 p. m. (R. 28a–30a, 53a–54a). In the presence of both petitioners the other end of the case was opened and additional packets of diamonds were found (R. 31a, 55a–56a, 206a, 221a). On the way to the customs office, Mr. Klapholz, in response to his question, and later, before the petitioners were separated and questioned, both were advised

of their right against self-incrimination and their right to counsel (R. 32a, 33a, 54a–55a, 57a–58a, 91a–92a, 201a, 222a).

Their denials of knowledge of the contents of the case were challenged by agents who made reference to documentary receipts signed by petitioners for prior shipments of similar parcels (R. 33a, 227a–228a). After consultation with her husband, the wife stated she had been only a messenger in the transmission of the contraband diamonds and asked what the authorities wanted (R. 34a, 202a, 204a). The wife was then requested to consider with her husband whether they would cooperate with the authorities by permitting the customs agents to go to petitioners' home where it was anticipated the ultimate consignees would call for the packages (R. 34a, 42a, 59a, 93a–94a, 202a–203a, 224a). After discussing the matter in privacy, petitioners at about 7:00 p. m. indicated their readiness to permit the use of their apartment (R. 38a, 60a). Shortly thereafter the agents, together with petitioners, left the customs office and reached the apartment at about 8:00 p. m., August 2. They remained in the apartment day and night until about 11:30 a. m., on August 4 (R. 61a, 69a).

During their stay at petitioners' apartment, the agents listened in on all telephone calls on an extension which had been attached in the presence of petitioners (R. 61a, 67a, 215a). This arrangement had been discussed with, and con-

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sented to by, petitioners at the customs office after they had agreed to cooperate (R. 96a, 215a, 242a). There were several calls during the evening of August 2 and through August 3 (R. 98a–102a, 230a–234a). Two persons at different times arrived at the apartment, possessed themselves of packages of diamonds (while the agents were hidden from view), and were arrested (R. 77a–80a, 103a–104a, 234a–235a).

At about 7:00 a. m., on August 4, an overseas telephone call from Germany was received, during the course of which petitioner-husband advised the caller, apparently his brother, that the police were in the apartment (R. 236a–237a). Thereafter, at about 10:00 o'clock, the agents executed a search warrant which had been issued at about 6:00 p. m. on August 2 (R. 4a–8a, 69a–71a). At 11:30 a. m., when the search was concluded, petitioners were taken first to the customs office at New York City and then arraigned before a United States Commissioner in the Eastern District of New York that afternoon (R. 53a). A warrant for the search of petitioners' safety deposit vault was obtained on August 4 and executed August 5 (R. 10a–17a).

On August 23, 1954 petitioners were indicted in the Eastern District of New York. On September 13, 1954, while the indictment was pending against them in the Eastern District, petitioners filed motions in the Southern District to suppress all evidence obtained in execution of the search

warrants and by the customs agents during the time they were in the apartment (R. 2a–4a, 10a–12a). Following a hearing on the motions, Judge Weinfield ruled that, since petitioners had consented to the entry of the agents in their apartment, their detention from the time of their arrest at 4:00 p. m., August 2, until 10:30 a. m., August 3, without arraignment was reasonable (R. 248a–249a), but that further detention without arraignment after 10:30 a. m., August 3, was unreasonable and that the consent of petitioners did not waive such delay (R. 249a–252a). He also held that the search warrants were validly issued and executed (R. 252a–256a). He therefore granted the motion "only to the extent [of suppressing] all evidence derived as a result of the presence of the customs agents in the defendants' apartment from 10:30 o'clock on August 3rd up to the execution of the search warrant at or about 10:00 a. m. on August 4th" and denied it as to all other evidence (R. 252a, 259a).

Petitioners and the government both appealed, and the Court of Appeals unanimously affirmed in all aspects the judgment of the District Court (Pet. 9).

ARGUMENT

The petition for certiorari, which relates only to the partial *denial* of petitioners' motion to suppress, raises no unsettled questions of general importance. The decisions below as to this aspect of

the case are a correct application of well-established principles.[1]

1. Petitioners argue (Pet. 6) that the court below was not justified in apportioning the time that petitioners were held without arraignment between a reasonable and unreasonable period, for the purposes of determining the motion to suppress. That differentiation is, however, authorized by the decision of this Court in *United States* v. *Mitchell*, 322 U. S. 65, where the defendant, within a short time after his arrest, confessed to his crime and consented to the search of his home to recover the stolen property. Despite the subsequent delay of eight days in arraigning Mitchell, the Court held that his confession of guilt was admissible since it had occurred before there was any unreasonable delay in arraignment. Moreover, Rule 5 (a) of the Federal Rules of Criminal Procedure (*supra*, p.

[1] There are novel and disputable issues—involved in the partial *granting* of the motion to suppress—as to the authority of a court to suppress before trial, in a district other than that of trial, evidence which does not consist of tangible, physical objects. However, since the decision of the court below suggests that, although the power exists, it should not normally be exercised by a court other than the trial court, and since the suppression is limited by the court below to be applicable against petitioners alone, the government has not, at this point, sought review of those aspects of the decision. In the event of a grant of certiorari here, the government reserves the right to argue in support of the judgment below, insofar as it relates to evidence secured as the result of detention, *inter alia*, that the District Court was without jurisdiction to grant the relief sought.

2), providing that an arresting officer shall, upon making an arrest, take the person arrested "without unnecessary delay" before the nearest available commissioner for arraignment, plainly recognizes that some delay is reasonable.

As both courts below held, the delay in arraignment from the time of arrest at 4:00 p. m., August 2, until 10:30 a. m., August 3, was reasonable and necessary to complete the interrogation, the photographing, and the fingerprinting of petitioners. *United States* v. *Hymowitz,* 196 F. 2d 819, 821–2 (C. A. 2); *Pierce* v. *United States,* 197 F. 2d 189 C. A. D. C.), certiorari denied, 344 U. S. 846; *Garner* v. *United States,* 174 F. 2d 499 (C. A. D. C.), certiorari denied, 337 U. S. 945; *Haines* v. *United States,* 188 F. 2d 546 (C. A. 9), certiorari denied, 342 U. S. 888. That the Commissioner issued a search warrant to the customs agents at 6:00 p. m., August 2, the day of petitioners' arrest, does not establish that further delay in petitioners' arraignment was unreasonable since petitioners did not conclude their private conference, at which they agreed to cooperate with the customs agents, until 7:00 p. m., August 2. The delay from seven o'clock until the next morning would not be unreasonable under any circumstances, and particularly not in this case where it was occasioned by the trip to and the stay in petitioners' apartment, which was done with their freely given consent in a voluntary effort to mitigate their guilt.

2. That sufficient cause was shown for the issuance of the two warrants to search petitioners' apartment and safety deposit box is manifest from an examination of the warrants and the affidavits upon which they were based (R. 4a–8a, 12a–16a). They were not issued on mere suspicion or belief (*Nathanson* v. *United States,* 290 U. S. 41), but upon facts and circumstances within the knowledge of the customs agent and of which the customs agent had reasonably trustworthy information sufficient to warrant a man of reasonable caution to believe that an offense had been or was being committed, and that the property used in the commission of the offense was to be found at the place to be searched. *Brinegar* v. *United States,* 338 U. S. 160; *Washington* v. *United States,* 202 F. 2d 214 (C. A. D. C.), certiorari denied, 345 U. S. 956.

The affidavit of the customs agent for the warrant to search petitioners' apartment states that when petitioners were arrested on August 2, 1954, they were in possession of an imported wooden box in which were concealed approximately 2,000 carats of contrabrand diamonds worth approximately $200,000; that information that diamonds were concealed in the box came from a confidential informant not in this country; that the same informant had also advised that petitioners had previously received 8 or 9 packages of contraband diamonds, one of which was as recent as July 19, 1954 (R. 7a). Since the discovery of this large shipment of undeclared diamonds so effectively

confirmed the accuracy of the informant's information, a reasonably cautious man would be warranted in believing and relying on the verity of other information from the same source. Thus, the customs agent had knowledge that petitioners had previously received 8 or 9 previous air shipments from abroad, as evidenced by their signed receipts, one of which was less than two weeks prior to their arrest, and he had also been informed by a person whose reliability had just been tested that these shipments concealed diamonds. Under these circumstances, the agent was reasonably entitled to believe that some portion of the prior contrabrand diamond shipments, or materials used in smuggling them in, would be found in petitioners' apartment. All the facts alleged in the affidavit were incorporated into and made part of the search warrant issued by the Commissioner and served on petitioners.

The affidavit for the warrant to search petitioners' safety deposit box not only recites all of the same facts set forth in the affidavit for a warrant to search the apartment, but it also states that Mrs. Klapholz had admitted that she had received contraband diamonds on prior occasions (R. 15a). In the light of the precise facts stated in the affidavits, and incorporated by reference into the warrants themselves, there was sufficient probable cause for issuing the warrants.

3. The validity of the warrants was not vitiated by the brief delay in their execution. Rule 41 (d) of the Federal Rules of Criminal Procedure (*supra* pp. 4–5) provides that a search warrant may be executed and returned within ten days after it is issued. The warrant to search the apartment was issued August 2 (R. 4a–5a) and executed August 4 (R. 8a). The warrant to search the safety deposit box was issued August 4 (R. 12a–13a) and executed August 5 (R. 17a). Both warrants were returned August 6 (R. 8a, 17a), well within the rule's ten-day limit. The two-day lapse between the issuance and the execution of the warrant to search the apartment did not prejudice petitioners' rights, as the facts which were alleged in the affidavit to support the issuance of the warrant could not, in the light of the circumstances, have changed by the time of its execution. Cf. *Sgro* v. *United States,* 287 U. S. 206, 211. See also *Seymour* v. *United States,* 177 F. 2d 732 (C. A. D. C.), holding that "forthwith" as used in Rule 41 (c) (*supra,* pp. 3–4)—directing the "officer to search forthwith"—means within a reasonable time under all the circumstances. In this case, that would include the circumstance that petitioners had permitted the agents to remain in their apartment.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1954.

U. S. GOVERNMENT PRINTING OFFICE : 1954